

2000

State of Utah v. Joey Luis Silva : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	Case No. 990331-CA
Plaintiff / Appellee,)	
)	
v.)	
)	PRIORITY NO. 2
JOEY LUIS SILVA,)	
)	
Defendant / Appellant.)	ORAL ARGUMENT REQUESTED

BRIEF OF APPELLANT

Appeal from the Judgment of conviction of Communications Fraud, a second degree felony, in violation of Utah Code Ann. § 76-10-1801, and Attempted Escape, a class A misdemeanor, in violation of Utah Code Ann. § 76-8-309, which was entered on March 17, 1999, in the Second District Court, Davis County, the Honorable Darwin C. Hansen presiding.

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None.

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f).

STATEMENT OF ISSUES / STANDARDS OF REVIEW

1. Whether the trial court, in the course of its constitutional determination as to the admissibility of the earwitness identification testimony, erroneously admitted the voice-identification testimony of numerous state's witnesses; thereby depriving defendant of his constitutional rights to due process. The trial court's determination as to admissibility of the voice-identification testimony is a question of law, which is reviewed for correctness. *State v. Nelson*, 950 P.2d 940, 942-43 (Utah Ct. App. 1997). Defendant preserved this issue by moving to strike the voice-identification testimony of substantially all of the law enforcement witnesses utilized by the State at trial (See, e.g., R. 172, Trial Transcript, Vol. II, pp. 428-29);

2. Whether appointed trial counsel, by failing to request a cautionary jury instruction that accurately reflected the *Long* factors to be considered in the course of evaluating voice-identification testimony, deprived defendant of his

constitutional right to the effective assistance of counsel. To make such a showing, Defendant must show, first, that counsel rendered a deficient performance, falling below an objective standard of reasonable professional judgment, and, second, that counsel's performance was prejudicial. *Bundy v. DeLand*, 763 P.2d 803 (Utah 1988). Such claims present mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070 (1984). When available, the appellate court defers to the trial court's findings of fact, but reviews its application of legal principles to its factual findings for correctness. *State v. Hay*, 859 P.2d 1, 4-5 (Utah 1993). Defendant need not preserve this issue inasmuch as it can be raised for the first time on appeal;

3. Whether there was sufficient evidence to establish Defendant's conviction of Attempted Escape. When reviewing a claim of insufficiency of the evidence in a jury trial, the appellate court views the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict and "assumes the jury believed the evidence and inferences that support the verdict." *State v. Wood*, 868 P.2d 70, 87 (Utah 1993); see also *State v. Hamilton*, 827 P.2d 232, 233 (Utah 1992); *State v. Fisher*, 972 P.2d 90, 97 (Utah Ct. App. 1998). In other words, the appellate court will affirm the jury verdict "if

there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made.'" *Wood*, 868 P.2d at 87-88 (quoting *State v. Booker*, 709 P.2d 342, 345 (Utah 1985)); see also *State v. Hall*, 946 P.2d 712, 724 (Utah Ct. App. 1997), *cert. denied*, 953 P.2d 449 (Utah 1998). Defendant preserved this issue by virtue of his opposition to the charge of Attempted Escape throughout the jury trial.

DETERMINATIVE AUTHORITY

The constitutional provisions, statutes, ordinances, rules, regulations, or case law whose interpretation is determinative, are set out verbatim, with the appropriate citation, in the body and arguments of the instant Brief of Appellant.

STATEMENT OF THE CASE

This case, among other things, involves the question of whether the standards set forth for determining the reliability of eyewitness testimony also apply to earwitness testimony. Accordingly, this case involves the constitutional right of an accused to have the trial court determine the constitutional reliability of earwitness identifications prior to consideration of the same by a jury.

In the instant case, Defendant was alleged to have befriended another inmate, Mr. Calvin Slaugh, and, through the course of that relationship, to have obtained information by which Defendant attempted to be released from jail. Defendant was alleged to have utilized Mr. Slaugh's brother, Mr. Ralph Slaugh, to unknowingly post bail on behalf of Defendant instead of his brother, as intended. Prior to completing the planned bail, the scheme was discovered.

By way of Information, Defendant was charged with Communications Fraud, a second degree felony, in violation of Utah Code Ann. § 76-10-1801, and Attempted Escape, a class A misdemeanor, in violation of Utah Code Ann. § 76-8-309. At trial, Defendant's counsel objected to and moved to strike the State's witnesses based on various unreliability grounds and the circumstances surrounding their voice identification of Defendant, which the trial court denied. Further, the record indicates that the State failed to establish the elements of the charge of Attempted Escape beyond a reasonable doubt. After deliberation, the jury returned a verdict of guilty on both counts.

That same day, the trial court sentenced Defendant to an indeterminate term of on to fifteen years on the charge of Communications Fraud, to be served consecutively with any other

charges Defendant serves, and one year in jail on the charge of Attempted Escape. On March 17, 1999, the trial court signed the Judgment, which was entered that same day. Defendant, through appointed appellate counsel, filed Notice of Appeal on April 14, 1999.

STATEMENT OF FACTS

1. This case, among other things, involves questions concerning unduly suggestive earwitness identifications reliability determinations, or the lack thereof, of earwitness testimony utilized at trial (See R. 103-04, Jury Instruction No. 26). Hence, this case involves questions surrounding the constitutional right of an accused to have the trial court properly determine the constitutional reliability of earwitness identifications prior to consideration of the same by a jury;

2. While as an inmate at the Davis County Jail, Defendant allegedly befriended another inmate, Mr. Calvin Slaugh, and, through the course of that relationship, obtained information by which Defendant attempted to be released from jail by way of a bond (See R. 1-4, Information). Defendant allegedly utilized Mr. Slaugh's brother, Mr. Ralph Slaugh, to unknowingly post bail on behalf of Defendant instead of his brother, as intended (See *id.*

at R. 2-3); Prior to release, the scheme was discovered (*See id.* at R. 4);

3. By way of Information, Defendant was charged with Communications Fraud, a second degree felony, in violation of Utah Code Ann. § 76-10-1801, and Attempted Escape, a class A misdemeanor, in violation of Utah Code Ann. § 76-8-309 (*See* R. 1-4, Information);

4. During trial, Defendant's counsel moved to strike the testimony of Detective David Bremmer on the grounds that Detective Bremmer's identification of Defendant's voice was based on a conversation that he overheard between another detective and Defendant subsequent to the charges being filed (*See* R. 171, Trial Transcript, Vol. I., pp. 203-04);

5. Pursuant to the trial court's direction, Defendant's trial counsel subsequently filed a motion to strike the testimony of Detective David Bremmer because the circumstances surrounding the testimony were impermissibly suggestive (*See* R. 61-62, Motion to Strike Testimony of Detective Dave Bremer [sic] Regarding Voice Identification). The trial court failed to rule on Defendant's motion;

6. At trial, counsel objected to and moved to strike the earwitness identifications of Defendant by various State's

witnesses as unduly suggestive and unreliable, which the trial court denied (See R. 172, Trial Transcript, Vol. II, pp. 428-29);

7. On the charge of Attempted Escape, the trial court instructed the jury that

Before you can convict the defendant Joey Luis Silva of the crime of Attempted Escape as charged in Count Two of the Information, you must believe from the evidence and a [sic] beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 1st day of August, 1998, the defendant, Joey Luis Silva, was under arrest or in official custody in Davis County, State of Utah, and
 2. That he attempted to leave official custody without authorization, and
 3. That he did so intentionally, knowingly, or recklessly.
-

(See R. 86, Jury Instruction No. 9) (Emphasis added);

8. At trial, Mr. Todd Harris, the representative of the bail bond company, testified that a person using Defendant's name contacted him by telephone and arranged to have bail posted for Defendant (See R. 171, Trial Transcript, Vol. I, p. 159, lines 2-19). The caller identified the cosigner of the bond as "Slaugh" (See *id.* at R. 171, p. 159, lines 20-23);

9. According to Mr. Harris' testimony, Mr. Slaugh called and made arrangements to "bail out this Joey Silva." (See *id.* at R. 171, p. 160, lines 5-13). In light of the evidence presented

in the course of the trial, the State failed to establish the elements of the charge of Attempted Escape beyond a reasonable doubt;

10. After its deliberation, the jury returned a verdict of guilty on both counts (See R. 120, Verdict);

11. That same day, the trial court sentenced Defendant to an indeterminate term of one to fifteen years on the charge of Communications Fraud, to be served consecutively with any other charges Defendant serves, and one year in jail on the charge of Attempted Escape (See R. 121, Judgment and Commitment to the Utah State Prison; R. 142, Judgment);

12. The trial court signed the Judgment on March 17, 1999, which was entered that same day (See R. 142, Judgment, a true and correct copy of which is attached to the Brief of Appellant as Addendum A);

13. Defendant, through appointed appellate counsel, filed Notice of Appeal on April 14, 1999 (See R. 147-150, Notice of Appeal).

SUMMARY OF ARGUMENTS

1. The standards set forth in *Ramirez*, *Lopez*, and *Long* should apply to earwitness identification testimony. The trial court, in the course of its constitutional determination as to

the admissibility of the State's earwitness identification testimony, erroneously admitted the voice-identification testimony and thereby deprived Defendant of his constitutional rights to due process. According to the standards set forth in *Ramirez, Lopez, and Long*, the numerous voice-identifications by the law enforcement officers in the instant case are constitutionally unreliable and impermissibly suggestive. Hence, under the facts of this case, the trial court erred by allowing the jury to hear the voice-identification testimony of the aforementioned law enforcement witnesses;

2. By failing to request a cautionary jury instruction about the earwitness testimony that reflected the similar factors related to eyewitness identification testimony as set forth in *State v. Long*, appointed trial counsel deprived Defendant of his constitutional right to the effective assistance of counsel. Appointed trial counsel's failure to request such a cautionary jury instruction fell below an objective standard of reasonable professional judgment in light of existing Utah case law and the arguments and analogies made by counsel and the trial court during trial. But for trial counsel's deficient performance of failing to request such a cautionary instruction, Mr. Silva would have had the opportunity to have the jury advised about the

factors it should consider in the course of evaluating earwitness identification testimony;

3. The evidence at trial was insufficient to establish Defendant's conviction for Attempted Escape inasmuch as there was no evidence presented at trial to establish the element that Defendant attempted to leave official custody without authorization. Even when the record evidence is viewed in the light most favorable to the jury's verdict, there is not even some evidence to establish or support the element that Defendant attempted to leave official custody without authorization of the jail. Moreover, the State's own evidence establishes that the alleged bond that was to be posted was in fact to be in the name of Joey Silva.

ARGUMENTS

INTRODUCTION: THE APPLICABILITY OF *Ramirez* AND *Lopez* TO EARWITNESS TESTIMONY AND VOICE IDENTIFICATIONS.

This case presents the apparent issue of first impression of whether the standards for determining the reliability and suggestiveness of eyewitness identifications as set forth in *State v. Ramirez*, 817 P.2d 774 (Utah 1991) and *State v. Lopez*, 886 P.2d 1105 (Utah 1994), apply to earwitness testimony and voice identifications as well. In *Ramirez*, the Utah Supreme

Court set forth the procedure to be followed and the factors to be considered by a trial court in determining the reliability of eyewitness testimony under the due process clause of the Utah Constitution.¹ *Id.* at 778-84. In the course of its analysis, the Utah Supreme Court provided a broad overview of the law surrounding the admissibility of eyewitness identifications, which included a discussion about the separate and distinct roles of the prosecutor, judge, and jury. *Id.* at 778.

As set forth in *Ramirez*, "[t]he burden of demonstrating the admissibility of the proffered evidence is on the prosecution" to lay the requisite foundation. *Id.* Such a foundation is necessary for the trial court to make the necessary preliminary factual findings and legal conclusions concerning admissibility. *Id.*² The judge, "as arbiter of the constitutional admissibility of an identification," is "required to scrutinize proffered evidence for constitutional defects." *Id.*; see also *State v. Nelson*, 950 P.2d 940, 943 (Utah Ct. App. 1997). If presented with the issue of the admissibility of eyewitness identification, the trial judge must preliminarily determine whether the

¹See Utah Const. art. I, § 7, which provides, "No person shall be deprived of life, liberty or property, without due process of law."

²"The defendant is entitled to a determination by the court of the evidence's constitutional admissibility." *State v. Ramirez*, 817 P.2d 774, 778 (Utah 1991).

identification is sufficiently reliable so as not to deny the accused of due process if considered by the jury. *Ramirez*, 817 P.2d at 778. If admissible, the jury determines the weight to be given to such evidence. *Id.*

The Utah Supreme Court, in the process of discussing the roles of the judge and jury, expressed concern about the "[p]otential for role confusion and for erosion of constitutional guarantees inhere[nt] in th[e] overlap of responsibility of judge and jury" *Id.* Accordingly, the Court emphasized the need for the trial court not to "abdicate its charge as gatekeeper to carefully scrutinize proffered evidence for constitutional defects" *Id.* Consequently, under *Ramirez*, the trial court must initially determine whether eyewitness testimony is constitutionally reliable prior to it being admitted.

In determining whether an eyewitness identification is constitutionally reliable, the trial court must consider the following pertinent factors:

- (1) [T]he opportunity of the witness to view the actor during the event;
- (2) the witness's degree of attention to the actor at the time of the event;
- (3) the witness's capacity to observe the event, including his or her physical and mental acuity;
- (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and
- (5) the nature of the event being observed and the likelihood that the

witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's.

Id. at 781 (quoting *State v. Long*, 721 P.2d 483, 493 (Utah 1986)). "The ultimate question to be determined is whether, under the totality of the circumstances, the identification was reliable." *Id.*

Because essentially the same concerns exist with respect to earwitness identification as do in situations involving eyewitness identifications, the standards set forth in *Ramirez* should likewise apply to earwitness identifications such as those in the instant case. Indeed, the trial court in the instant case analogized earwitness identifications to eyewitness identifications in the course of its determinations (*See, e.g.,* R. 172, Trial Transcript, Vol. II, p. 436, lines 7-10).

In *Lopez*, the Utah Supreme Court outlined the two-part test utilized to determine whether a photo array was so suggestive that subsequent admission of eyewitness testimony at trial violates federal due process. *Lopez*, 886 P.2d at 1111. As the court stated, "The first part of the test requires us to determine whether the 'pretrial photographic identification procedure used . . . was so impermissibly suggestive as to give

rise to a very substantial likelihood of irreparable misidentification.'" *Id.* (quoting *State v. Thamer*, 777 P.2d 432, 435 (Utah 1989)). "The second part dictates that if the photo array was impermissibly suggestive, any in-court eyewitness identification 'must be based on [an] untainted, independent foundation to be reliable.'" *Id.*

According to the court, "[i]n evaluating whether a pretrial photo identification procedure is impermissibly suggestive under the first part of the test, the main question is whether the photo array emphasized the defendant's photo over the others." *Id.* Additionally, the court articulated some factors to consider in the course of such an evaluation, which include "whether the words and body language of the police officers who presented the array conveyed an attitude of disinterest, whether the officers manipulated the photos to indicate their belief that one of the photos portrayed the perpetrator, and whether the photos themselves were selected so that the defendant's photo stood out from the rest." *Id.* at 1111-12.

As the instant case illustrates, the aforementioned *Lopez* two-part test for determining whether a pretrial photo identification is unduly suggestive should also apply to pretrial voice identifications. At trial, Defendant's trial counsel argued that the pretrial voice identification by substantially

all of the witnesses in the instant case was unduly suggestive in violation of Defendant's due process rights (See, e.g., R. 172, Trial Transcript, Vol. II, pp. 428-29).

I. IN THE COURSE OF ITS CONSTITUTIONAL DETERMINATION AS TO THE ADMISSIBILITY OF THE EARWITNESS IDENTIFICATION TESTIMONY, THE TRIAL COURT ERRONEOUSLY ADMITTED THE VOICE-IDENTIFICATION TESTIMONY OF NUMEROUS STATE'S WITNESSES; THEREBY DEPRIVING DEFENDANT OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS.

The trial court denied Mr. Silva of his constitutional rights to due process by determining that the earwitness identification testimony and voice identifications by several of the State's witnesses at trial were admissible as a matter of law. Earlier in the week just prior to trial in the instant case, Detective Bremmer held a conference in the Davis County Attorney's Office during which numerous witnesses, who were utilized at trial, together listened to various tapes containing conversations that purportedly included Mr. Silva (See, e.g., R. 172, Trial Transcript, Vol. II, pp. 438-39).³

³As set forth in the Statement of Facts, Defendant's appointed trial counsel, pursuant to the trial court's direction, filed a motion to strike the testimony of Detective David Bremmer as being borne out of circumstances that are impermissibly suggestive (See R. 61-62, Motion to Strike Testimony of Detective Dave Bremer [sic] Regarding Voice Identification). The trial court erred by failing to rule on the motion.

Officer John Carter, one of the people present during the aforementioned conference, testified on cross-examination that Detective Bremmer asked the individuals, in unison, whether they could identify the voice on the tapes as that of Joey Silva (See, e.g., *id.* at R. 172, p. 441, lines 16-25). Further, as the tapes were played, there were verbal comments and nodding of heads by the individuals at the conference, affirming that the voice on the tapes was that of Joey Silva (See *id.* at R. 172, pp. 443-444).

Detective John Fielding, another witness utilized by the State at trial to identify the voice of Mr. Silva, was presented, prior to trial, with various tapes by Detective Bremmer that allegedly contained the voice of Mr. Silva (See *id.* at R. 172, p. 453-454). According to Detective Fielding's testimony, the tapes presented to Detective Fielding for voice identification purposes contained notations on the tapes, "Conversations involving Joey Silva" (See *id.* at R. 172, p. 454, lines 1-9). In fact, Detective Fielding essentially acknowledged during his testimony that the notations on the tapes suggested that the voice on the tapes was that of Mr. Silva (See *id.* at R. 172, p. 455, lines 19-23).

Another witness utilized by the State to identify the voice of Mr. Silva at trial was Officer Bob Yeaman (See, e.g., *id.* at

R. 172, p. 475, lines 12-15). Officer Yeaman was also present during the identification conference at the Davis County Attorney's Office (*See id.* at R. 172, p. 482-83). During his testimony outside the presence of the jury, Officer Yeaman testified that the individuals present during the conference made several unfettered unanimous comments while listening to the tapes such as, "[T]hat's Joey" (*See id.* at R. 172, p. 483-84).

Additionally, Detective Lon F. Brian, who was also present during the previously mentioned voice-identification conference, was utilized by the State to identify the voice of Mr. Silva at trial (*See* R. 173, Trial Transcript, Vol. III, pp. 579-600). During his testimony outside the presence of the jury, Detective Brian testified that he, prior to listening to the tapes, knew that the investigation of Detective Bremmer focused on Joey Silva (*See id.* at R. 173, p. 509, lines 9-24).

The State also utilized the voice-identification testimony of Detective Joel Morrison at trial, who was also present at the voice-identification conference at the Davis County Attorney's Office (*See id.* at R. 173, pp. 604-08). Detective Morrison testified to the trial court that during the voice-identification conference, which included the prosecutor and essentially all of the law enforcement witnesses in the instant case, all of the individuals at the conference talked amongst themselves in the

course of making the requested voice identification (*See id.* at R. 173, 4-16).

According to the standards set forth in *Ramirez, Lopez, and Long*, for that matter, the numerous voice-identifications of the law enforcement officers in the instant case are constitutionally unreliable and impermissibly suggestive. *See State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991) (quoting *State v. Long*, 721 P.2d 483, 493 (Utah 1986)); *State v. Lopez*, 886 P.2d 1105, 1111 (Utah 1994) (quoting *State v. Thamer*, 777 P.2d 432, 435 (Utah 1989)). Further, the voice-identifications of substantially all of the State's witnesses at trial were tainted by the conference held in the Davis County Attorney's Office. Consequently, under the facts of this case, the trial court erred by allowing the jury to hear the voice-identification testimony of the aforementioned law enforcement witnesses.

II. BY FAILING TO REQUEST A CAUTIONARY JURY INSTRUCTION ABOUT THE EARWITNESS TESTIMONY THAT ACCURATELY REFLECTS AND ADVISES THE JURY ABOUT THE FACTORS OF EYEWITNESS IDENTIFICATION TESTIMONY AS SET FORTH IN *State v. Long*, APPOINTED TRIAL COUNSEL DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984), the United States Supreme Court established a two-prong

test for determining when a defendant's Sixth Amendment⁴ right to effective assistance of counsel has been denied. *Id.* at 687, 104 S.Ct. at 1064. Utah courts adopted this test, which follows: "To prevail, a defendant must show, first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant." *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988); see also *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998); accord *State v. Templin*, 805 P.2d 182, 186 (Utah 1990); *State v. Frame*, 723 P.2d 401, 405 (Utah 1986); *State v. Perry*, 899 P.2d 1232, 1239 (Utah Ct. App. 1995) *State v. Wright*, 893 P.2d 1113, 1119 (Utah Ct. App. 1995). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, (1993).

In order to meet the first prong of the test, a defendant must "'identify the acts or omissions' which, under the circumstances, 'show that counsel's representation fell below an

⁴The Sixth Amendment to the United States Constitution states in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

objective standard of reasonableness.'" *Templin*, 805 P.2d at 186 (quoting *Strickland*, 466 U.S. at 690, 688, 104 S.Ct. at 2066, 2064 (footnotes omitted); see also *Chacon*, 962 P.2d at 50 (quoting *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah), cert. denied, 513 U.S. 966, 115 S.Ct. 431 (1994)). A defendant must "overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment." *State v. Bullock*, 791 P.2d 155, 159-60 (Utah 1989), cert. denied, 497 U.S. 1024, 110 S.Ct. 3270 (1990).

To show prejudice under the second prong of the test, a defendant must proffer sufficient evidence to support "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Templin*, 805 P.2d at 187. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069; *Parsons*, 871 P.2d at 522; *Frame*, 723 P.2d at 405. In the process of arriving at this determination, the appellate court "should consider the totality of the evidence, taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record." *Templin*, 805

P.2d at 187; *see also State v. Hovater*, 914 P.2d 37, 39-40 (Utah 1996).

In *State v. Long*, 721 P.2d 483 (Utah 1986), the Utah Supreme Court set forth and discussed the requisite cautionary jury instruction to be utilized in cases where eyewitness identification is the central issue. *Id.* at 492, 494 n.8. The purpose of such a cautionary instruction is to advise the jury of the factors to be considered in course of evaluating eyewitness identification testimony. *Id.* at 492.

The jury instruction utilized in the instant case concerning the voice-identification testimony utilized at trial is deficient in many aspects (See R. 103-04, Jury Instruction No. 26). For example, the jury instruction in the instant case failed to emphasize that the burden is on the State to prove that the Defendant is the person who committed the crime. *See Long*, 721 P.2d at 494-95 n.8; *see also State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991) (affirmatively citing footnote 8 of *State v. Long* as the cautionary jury instruction). The jury instruction in the instant case also fails to list the numerous factors to be considered by the jury in determining whether the witness had the capacity to observe or hear the person committing the crime. *Long*, 721 P.2d at 494 n.8 (citing "personal motivations, biases,

or prejudices" and whether the witness is of a "different race" as factors to be considered).

Appointed trial counsel's failure to request a cautionary jury instruction that advised the jury of the concerns surrounding voice-identification testimony similar to those of eyewitness testimony fell below an objective standard of reasonable professional judgment. Appointed trial counsel's ineffective assistance of counsel is underscored by trial counsel's own arguments throughout the proceedings that eyewitness identification testimony is similar to voice identification testimony such as that in the instant case (*See, e.g., R. 172, Vol. II, pp. 428-29*). Moreover, the trial court, throughout his consideration of the admissibility of the voice-identification testimony, analogized voice-identification testimony to that of eyewitness identification testimony (*See, e.g., id. at R. 172, p. 436, lines 7-10*).

Appointed trial counsel's failure to timely request a cautionary jury instruction similar to that set forth in *Long* fell below an objective standard of reasonable professional judgment.⁵ But for trial counsel's deficient performance of

⁵The failure to request a cautionary jury instruction is exacerbated by the fact that voice identification was the central issue in the instant case. *See State v. Long, 7321 P.2d 483, 492 (Utah 1986)*.

failing to request such a cautionary instruction, Mr. Silva would have had the opportunity to have the jury consider the numerous factors that should be considered in evaluating voice-identification testimony. Further, appointed trial counsel's failure violates Mr. Silva's due process rights under article I, section 7 of the Utah Constitution.

III. THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO ESTABLISH DEFENDANT'S CONVICTION FOR ATTEMPTED ESCAPE INASMUCH AS THERE WAS NO EVIDENCE PRESENTED AT TRIAL TO ESTABLISH THE ELEMENT THAT DEFENDANT ATTEMPTED TO LEAVE OFFICIAL CUSTODY WITHOUT AUTHORIZATION.

When reviewing a claim of insufficiency of the evidence in a jury trial, the appellate court views the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict and "assumes the jury believed the evidence and inferences that support the verdict." *State v. Wood*, 868 P.2d 70, 87 (Utah 1993); *see also State v. Hamilton*, 827 P.2d 232, 233 (Utah 1992); *State v. Fisher*, 972 P.2d 90, 97 (Utah Ct. App. 1998). In other words, the appellate court will affirm the jury verdict "if there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made.'" *Wood*, 868 P.2d at 87-88 (quoting *State v. Booker*, 709 P.2d 342, 345 (Utah 1985)); *see*

also *State v. Hall*, 946 P.2d 712, 724 (Utah Ct. App. 1997), cert. denied, 953 P.2d 449 (Utah 1998).

When challenging the sufficiency of the evidence, a "[d]efendant has the burden of marshaling all the evidence that supports the verdict, and then showing that, when viewed in the light most favorable to the verdict, the evidence is insufficient.'" *State v Hayes*, 860 P.2d 968, 972 (Utah Ct. App. 1993) (quoting *State v. Vigil*, 840 P.2d 788, 793 (Utah Ct. App. 1992), cert. denied, 857 P.2d 948 (Utah 1993)). In the instant case, Mr. Silva must marshal all of the evidence in support of the verdict, including all circumstantial evidence, and then persuade the appellate court that, based upon this evidence, the State failed to prove that he was a was guilty of Attempted Escape. See *State v. Scheel*, 823 P.2d 470, 472 (Utah Ct. App. 1991). "Criminal convictions cannot rest on conjecture or supposition; they must be established by proof beyond a reasonable doubt." See *State v. Workman*, 852 P.2d 981, 987 (Utah 1993) (noting that the State's argument that "speculative inferences can constitute proof beyond a reasonable doubt is to attack one of the most sacred constitutional safeguards at its core").

As set forth in Utah Code Ann. § 76-8-309, "A person is guilty of escape if he leaves official custody without

authorization." Attempt and its classification as an offense is set forth in Utah Code Ann. §§ 76-4-101 (1999) & Utah Code Ann. § 76-4-102 (Supp. 1999).

The following is the marshaled evidence that supports the jury's verdict that Defendant was guilty of Attempted Escape:

(1) The testimony by Judge Glen R. Dawson concerning the amount of Mr. Silva's bail (See R. 171, Trial Transcript, Vol. I., pp. 30-35); (2) The testimony of Detective David Bremmer, the lead investigator, concerning his investigation of the case (See *id.* at R. 171, pp. 185-89); (3) The testimony of Officer Bob Yeaman re procedures and related matters concerning the jail, including his voice-identification of Mr. Silva (See *id.* at R. 171, pp. 41-141); (4) The testimony of the Slaughs concerning the alleged scheme concerning posting of bail for Mr. Silva (See R. 172, Trial Transcript, Vol. II, pp. 249-317); (5) The voice-identification testimony of the numerous law enforcement witnesses both outside and in the presence of the jury (See R. *in passim*); and (6) the testimony of the bail bond company owner and representative concerning the alleged efforts to post bail on behalf of Mr. Silva (See R. 171, Trial Transcript, Vol. I, pp. 143-83; R. 173, Trial Transcript, Vol. III, pp. 622-41).

Even when the aforementioned evidence is viewed in the light most favorable to the jury's verdict, there is not even some

evidence to establish or support the element that Mr. Silva attempted to leave official custody without authorization of the jail. Moreover, the State's evidence establishes that the alleged bond that was to be posted was in fact to be in the name of Joey Silva (*See id.* at R. 171, p. 160, lines 8-18; *see also* R. 171 at p. 162, lines 16-23) (bond company representative stating that he obtained booking sheet for Joey Silva to post bail bond). In light of record and evidence presented at trial, there is insufficient evidence to support Defendant's conviction of Attempted Escape.

As is established by the foregoing evidence at trial, the State failed to prove each element beyond a reasonable doubt, as it is required to do. *See* Utah Code Ann. § 76-1-501.⁶ A review of the evidence supporting the Attempted Escape conviction leads

⁶Utah Code Ann. § 76-1-501 provides, in relevant part:

(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "elements of the offense" mean:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense; or

(b) The culpable mental state required.

. . . .

one to the logical conclusion that Defendant's conviction is based on conjecture or supposition, which does not constitute proof beyond a reasonable doubt. Reversal of the Attempted Escape conviction for insufficiency of the evidence is therefore appropriate in the instant case.

CONCLUSION

Based on the foregoing, Mr. Silva respectfully requests that this Court reverse his conviction of Communications Fraud and Attempted Escape and for such other relief as the Court deems just and appropriate under the circumstances presented in this case and arguments set forth herein.

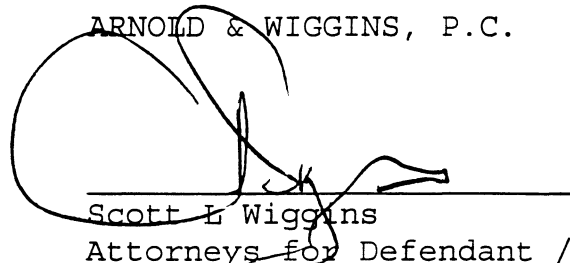
STATEMENT REGARDING ORAL ARGUMENT AND METHOD OF DISPOSITION

Mr. Silva requests oral argument because oral argument will materially enhance the decisional process due to the novel and apparent issues of first impression in the instant appeal dealing with voice-identification testimony. Further, oral argument will assist the court in addressing the other issue concerning insufficiency of evidence supporting Defendant's conviction of Attempted Escape and the constitutional right to the effective assistance of counsel. These issues present matters requiring further development in the area of criminal law for the benefit

of the bar and public. Counsel for Mr. Silva also requests that the method of disposition of the instant appeal be by opinion designated by the Court "For Official Publication" for purposes of precedential value and direction in future cases.

RESPECTFULLY SUBMITTED this 12th day of January, 2000.

ARNOLD & WIGGINS, P.C.



Scott L Wiggins
Attorneys for Defendant /
Appellant

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following on this 12th day of January, 2000:

Mr. J. Frederic Voros, Jr.
Criminal Appeals Division
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854



Scott L Wiggins

ADDENDUM

Addendum A: Judgment
Addendum B: Jury Instruction No. 26

Tab A

MELVIN C. WILSON 3513
Davis County Attorney
800 West State Street
Farmington, Utah 84025
Telephone: 451-4300

FILED IN CLERK'S OFFICE

MAR 17 10 33 AM '99

CLERK OF DISTRICT COURT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

THE STATE OF UTAH,	:	JUDGMENT
Plaintiff,	:	
vs.	:	Case No. 981701362
JOEY LUIS SILVA	:	
AKA PAUL DANFORTH,	:	
Defendant.	:	Hon. Darwin C. Hansen, Judge

The above-entitled matter came on for sentence on the 16th day of November, 1998, the defendant being present in person and represented by his attorney, Laura Thompson, the State being represented by Carvel R. Harward, the Honorable Darwin C. Hansen, Judge, presiding.

The defendant having been convicted upon a verdict of guilty of the offenses of Communications Fraud, a second degree felony, and Attempted Escape, a class A misdemeanor, and the Court having asked if the defendant had anything to say why judgment should not be pronounced; and no sufficient cause to the contrary being shown or appearing to the Court;

IT IS ADJUDGED that the defendant is guilty of the offenses of Communications Fraud, a second degree felony, and

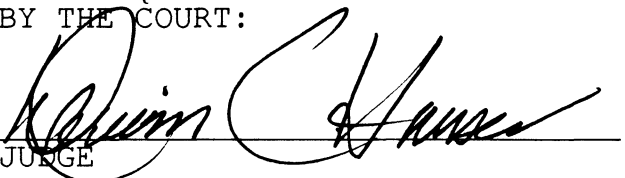
Attempted Escape, a class A misdemeanor, as charged and convicted.

IT IS FURTHER ADJUDGED that the defendant be confined and imprisoned at the Utah State Prison for the indeterminate term of one to fifteen years for the felony, and one year in the Davis County Jail to be served at the Utah State Prison for the misdemeanor, as provided by law.

Pursuant to Judgment and Commitment executed by the Court on the 16th day of November, 1998, the defendant has been transported to the Utah State Prison. It is recommended by the Court that the sentence herein ordered for count one run consecutively with any other charges at the Utah State Prison and that count two run concurrently with count one.

DATED this 17 day of March, 1998.

BY THE COURT:


JUDGE

CERTIFICATE OF DELIVERY

Delivered an unexecuted copy of the foregoing Judgment this _____ day of _____, 1998, to Laura Thompson, Attorney for Defendant.

Tab B

INSTRUCTION NO. 26

One of the most important questions in this case is the identification of the defendant as the person who committed the crime. The prosecution has the burden of proving beyond a reasonable doubt, not only that the crime was committed, but also that the defendant was the person who committed the crime. If after considering all of the evidence, you are not convinced beyond a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

The identification testimony that you have heard was an expression of belief or impression by the witnesses.

Many factors affect the accuracy of identification. In considering whether the prosecution has proved beyond a reasonable doubt that the defendant is the person who committed the crime, you should consider the following factors in evaluating the testimony of each individual witness:

1. Did the witness have an adequate opportunity to hear the criminal actor?

In answering this question, you should consider:

- a. The length of time the witness heard the actor,
- b. The distance between the witness and the actor,
- c. Whether the observation was face-to-face, or otherwise,
- d. The presence or absence of distracting noises or activity during the time spent listening to the actor,
- e. Any physical impairments of the witness affecting his/her ability to hear, and

- f. Whether the capacity of the witness to listen and hear the actor was impaired by nervousness, fright, confusion, stress, or any other factor.
- 2. Was the witness identification of the defendant completely the product of his/her memory?

In answering this question, you should consider:

- a. The length of time that passed between the witness' original hearing of the actor's voice and his/her identification of the defendant,
- b. The witness' mental capacity and state of mind at the time of the identification,
- c. The witness' exposure to opinions, descriptions or identifications given by other witnesses, to other accounts, or to any other circumstance or influence that may have affected the independence of his/her identification,
- d. Any instances when the witness gave a description of the actor's voice that is inconsistent with the defendant's voice, and
- e. The circumstances under which the defendant's voice was presented to the witness for identification.

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FILED
Utah Court of Appeals
JAN 14 2000
Julia D'Alesandro
Clerk of the Court

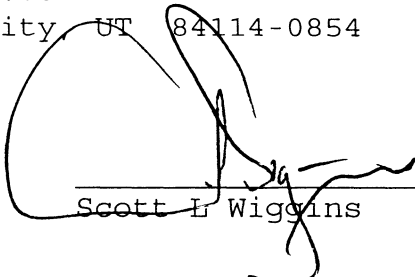
IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	Case No. 990331-CA
Plaintiff / Appellee,)	
)	
v.)	
)	
JOEY LUIS SILVA,)	
)	
Defendant / Appellant.)	

AMENDED CERTIFICATE OF SERVICE

I, Scott L Wiggins, hereby certify that I personally caused to be hand-delivered (2) true and correct copies of the **BRIEF OF APPELLANT** to the following, on this 14th day of January, 2000:

Mr. J. Frederic Voros, Jr.
Criminal Appeals Division
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

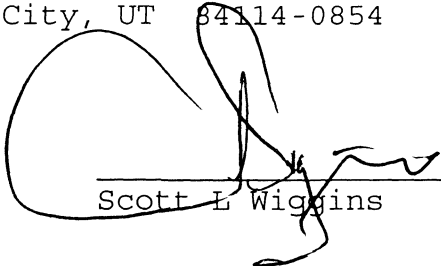


Scott L Wiggins

CERTIFICATE OF SERVICE

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Criminal Appeals Division
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854



Scott L Wiggins

COPY

FILED

Utah Court of Appeals

JAN 13 2000

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	Case No. 990331-CA
Plaintiff / Appellee,)	
)	
v.)	
)	
JOEY LUIS SILVA,)	
)	
Defendant / Appellant.)	

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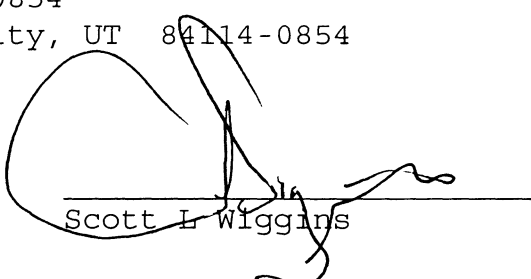


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Scott L Wiggins